Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	

REPORT AND ORDER

Adopted: August 5, 1999 **Released: August 6, 1999**

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Furchtgott-Roth dissenting in part, concurring in part and issuing a statement; Commissioner Tristani dissenting in part and issuing a statement.

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I. Introduction

1. The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.[1] In this *Report and Order*, we amend our broadcast and our cable/Multipoint Distribution Service ("MDS") attribution rules to improve the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees and markets, and facilitate application processing -- our goals in initiating this proceeding. In taking these steps, we have sought to avoid undue impact on our goal of promoting the rapid conversion of broadcast television licensees to a digital mode.[2] We initiated this long-pending proceeding in 1995, sought further comment after the passage of the Telecommunications Act of 1996, and have had the benefit of numerous comments on the variety of issues resolved herein. The new attribution rules we adopt today are integrally related to the rules adopted in our companion local television ownership and national television ownership proceedings.[3] A reasonable and precise definition

[1] *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984) (*"Attribution Order"*), *on recon.*, 58 RR 2d 604 (1985) (*"Attribution Reconsideration"*), *on further recon.*, 1 FCC Rcd 802 (1986) (*"Attribution Further Reconsideration"*); *Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al.*, 10 FCC Rcd 3606, 3614 (1995) (*"Attribution Notice"*). We also issued in this proceeding a *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al.*, 11 FCC Rcd 19895 (1996) (*"Attribution Further Notice"*).

[2] *See Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) (*"DTV Fifth Report and Order"*), *on recon.*, 13 FCC Rcd 7417 (1998); *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997) (*"DTV Sixth Report and Order"*), *on recon.*, 13 FCC Rcd 6860 (1998); *Second Memorandum Opinion and Order* on Reconsideration of the Fifth and Sixth Report and Orders, 14 FCC Rcd 1348 (1998).

[3] We also adopt today companion Reports and Orders in our television local ownership proceeding, *Report and Order* in MM Docket Nos. 91-221 & 87-8, FCC 99-209, adopted August 5, 1999 (*"TV Local Ownership Order"*) and in our television national ownership proceeding, *Report and Order* in MM Docket Nos. 96-222, 91-221, & 87-8,

of what interests should be counted in applying the multiple ownership rules is a critical element in assuring that those rules operate to promote the goals they were designed to achieve.

II. Background

2. The attribution rules that are the subject of this proceeding define what constitutes a "cognizable interest" in applying the broadcast multiple ownership rules,[4] the broadcast/cable cross-ownership rule,[5] and the cable/MDS cross-ownership rule.[6] We issued the *Attribution Notice* to review the attribution rules based on several considerations, including: (1) changes in the broadcasting industry and in the multiple ownership rules since our last revision of the attribution rules over ten years ago and our consequent desire to ensure that the attribution rules remain effective in identifying interests that should be counted for purposes of applying the multiple ownership rules; (2) concerns raised that certain nonattributable investments, while permissible under current rules, might permit a degree of influence that warrants their attribution; (3) concerns that individually permissible cooperative arrangements between broadcasters are being used in combination so as to result in significant influence in multiple stations that is intended to be prohibited by the multiple ownership rules; and (4) the need to address attribution treatment of Limited Liability Companies ("LLCs").

3. We solicited comment in the *Attribution Notice* on several issues, including: (1) whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive investor benchmark from 10 percent to 20 percent; (2) whether to expand the category of passive investors; (3) whether and, if so, under what circumstances to attribute nonvoting shares; (4) whether to retain our single majority shareholder exemption from attribution; (5) whether to revise our insulation criteria for limited partners,

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FCC 99-208, adopted August 5, 1999 ("*TV National Ownership Order*"). We incorporate into the record of this proceeding the Comments and Reply Comments filed in the TV Local Ownership and the TV National Ownership proceedings to the extent that they deal with issues incorporated into this proceeding. When we refer to Comments and Reply Comments filed in other proceedings, we will identify the proceedings in which they were filed. For this purpose, we will refer to the *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-222 & 87-8, 11 FCC Rcd 21655 (1996), as "*TV Local Ownership Second FNPRM*" and the *Further Notice of Proposed Rule Making* in MM Docket Nos. 91-222 & 87-8, 10 FCC Rcd 3524 (1995) as "*Local Ownership Further Notice.*" In addition, we will refer to the *Notice of Proposed Rule Making* in MM Docket Nos. 96-222, 91-221, & 87-8, 11 FCC Rcd 19949 (1996) as "*TV National Ownership NPRM.*"

[4] *See* Notes to 47 C.F.R. § 73.3555. The following corporate interests are generally attributable under the existing attribution rules for purposes of applying the broadcast multiple ownership rules: voting stock interests amounting to five percent or more of the outstanding voting stock, except for passive investors (*i.e.*, bank trust departments, insurance companies, and mutual funds) for which there is a ten percent benchmark; and positions as officers and directors. The following corporate interests are not currently attributable: minority stockholdings in corporations with a single majority shareholder; nonvoting stock; other nonvoting instruments such as options or warrants; and debt. All partnership interests are currently attributable, except sufficiently insulated limited partnership interests upon a certification that the limited partner is not materially involved, directly or indirectly, in the management or operation of the partnership's media-related activities. For a brief history of the attribution rules, see *Attribution Notice*, 10 FCC Rcd at 3610-12.

[5] *See* Notes to 47 C.F.R. § 76.501(a).

[6] 47 C.F.R. § 21.912 Note 1(A).

and whether to adopt an equity benchmark for noninsulated limited partners; (6) how to treat interests in LLCs and other new business forms under our attribution rules; (7) whether to eliminate the remaining aspects of our cross-interest policy; and (8) how to treat financial relationships and multiple business interrelationships which, although not individually attributable, should perhaps be treated as attributable interests when held in combination.

4. Congress subsequently enacted the Telecommunications Act of 1996 ("1996 Act"),[7] which substantially relaxed several of our ownership rules. We issued the *Attribution Further Notice* to seek comment as to how these ownership rule revisions should affect our review of the attribution rules. We also sought comment on new proposals, including a proposal to attribute the otherwise nonattributable interests of holders of equity and/or debt in a licensee where the interest holder is a program supplier to a licensee or a same-market media entity and where the equity and/or debt holding exceeds a specified threshold. Additionally, we sought comment on: (1) proposals to attribute television Local Marketing Agreements ("LMAs") and to modify the scope of the radio LMA attribution rules;[8] (2) whether we should revise our approach to joint sales agreements ("JSAs") in specified circumstances; (3) a study conducted by Commission staff, appended to the *Further Notice*, on attributable interests in television broadcast licensees and on the implications of this study for our attribution rules, particularly on the voting stock benchmarks; (4) whether we should amend the cable/MDS cross-ownership attribution rule;[9] and (5) transition issues.[10]

5. In the *Attribution Notice*, we stated our goals in initiating this proceeding as follows:

> While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[8] In this *Report and Order*, we refer to LMAs or time brokerage agreements. For purposes of applying the radio LMA rules, the Commission's current rules define time brokerage as "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." 47 C.F.R. § 73.3555(a)(4)(iii).

[9] 47 C.F.R. § 21.912 (Note 1(A)). For purposes of this rule, the attribution standard is defined by reference to the definitions contained in the Notes to § 76.501, but provides that: (i) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provision of Note 2(g) to § 76.501 shall not apply; and (ii) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more. *See also Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993) ("*Implementation Order*"), *reconsidered on other grounds*, 10 FCC Rcd 4654 (1995). We note here that the statutory and regulatory prohibitions on cable/MDS cross-ownership do not apply if the cable operator is subject to "effective competition" in its franchise area. *See* 47 U.S.C. § 533(a)(3); 47 C.F.R. § 21.912(e)(3).

[10] We note that we received late-filed Comments in response to the *Attribution Notice* and to the *Attribution Further Notice*. In the interests of obtaining as broad a record as we can, we have accepted all of these late-filed Comments. A list of Comments filed in response to the *Attribution Further Notice* is attached hereto as Appendix C. A list of Comments filed in response to the *Attribution Notice* was attached as Appendix C to the *Attribution Further Notice*.

by which investment capital may be made available to the broadcast industry. We intend to ensure that any revisions we make to the attribution rules meet these stated goals. We also seek to ensure that any new rules adopted are clear to our broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications.[11]

6. We believe the rule revisions we adopt today promote these goals.[12] In this *Report and Order*, we: (1) adopt an equity/debt plus attribution rule that would narrow, but not eliminate, the current exemptions from attribution for nonvoting stock and debt, as well as the single majority shareholder exemption; (2) attribute certain television LMAs and modify the radio LMA rules; (3) retain the 5 percent voting stock attribution benchmark, but raise the passive investor voting stock benchmark to 20 percent; (4) retain the current definition of passive investor; (5) eliminate the cross-interest policy; (6) decline to adopt attribution rules for JSAs; (7) adopt as an attribution rule our interim processing policy under which we apply limited partnership insulation criteria to LLCs; (8) retain the current insulation criteria for attribution of limited partnerships; (9) revise the cable/MDS cross-ownership attribution rule to conform it to the broadcast attribution rules, as revised in this *Report and Order*; and (10) establish transition measures with respect to interests made attributable as a result of rules adopted in this *Report and Order* that would result in violations of the multiple ownership rules. So that our broadcast attribution rules remain consistent, we also modify the attribution rules that apply to the broadcast/cable cross-ownership rule, Section 76.501(a) to incorporate the attribution rule changes adopted today.[13]

III. Issue Analysis

A. Stockholding Benchmarks

7. Background. The *Attribution Notice* sought comment on whether we should increase the voting stock benchmarks from five to ten percent for non-passive investors and from ten to twenty percent for passive investors.[14] This issue was originally raised in the *Notice of Proposed Rule Making and Notice of Inquiry* in MM Docket No. 92-51, ("*Capital Formation Notice*")[15] which cited concerns about the

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[11] *Attribution Notice*, 10 FCC Rcd at 3610 (footnotes omitted).

[12] We note that CanWest Global Communications Corp., in its Comments, asked that we liberalize rules governing foreign investment in U.S. broadcast properties. That request is outside the scope of this proceeding.

[13] We recognize that the attribution standards used in a number of other cable rules are implicitly or explicitly based on Section 76.501. For example, the attribution standards in the cable television horizontal ownership, channel occupancy and program access rules are derived from these attribution Notes. We have initiated a separate proceeding to address whether to modify the attribution criteria for these rules. *Notice of Proposed Rule Making* in CS Docket No. 98-82, 13 FCC Rcd 12990 (1998). In the instant proceeding, we are addressing only the attribution criteria that would apply to Section 76.501(a), the cable-broadcast cross-ownership rule.

[14] The category of "passive investors" consists of bank trust departments, mutual funds and insurance companies.

[15] 7 FCC Rcd 2654 (1992).

availability of capital to broadcasters. Insufficient evidence was submitted in comments to the *Capital Formation Notice* to warrant raising the benchmarks, and, therefore, the *Attribution Notice* again raised the issue of whether to increase the voting stock benchmarks.[16] In the *Attribution Further Notice*, the Commission noted that commenters responding to the *Attribution Notice* had again not submitted specific empirical data sufficient to conclude that the benchmarks should be raised. The *Attribution Further Notice* thus asked for additional information to justify raising the benchmarks, including information on changes in the economic climate and competitive marketplace, and the link between additional capital investment and raising the voting stock benchmarks.[17]

1. *Non-passive investor benchmarks*

8. Comments. Few commenters responded to our requests in the *Attribution Further Notice* for additional comments supporting the increase in the active investor benchmark to 10 percent.[18] The National Association of Broadcasters ("NAB") argued that a 10 percent benchmark would not adversely affect the Commission's regulatory interests since, according to the NAB, it is difficult to envision how an investor holding 10 percent or less of the voting stock of a company could exercise effective control if the investor or his representatives are neither officers nor directors of the company.[19] Tele-Communications, Inc. ("TCI") argued that voting stock holdings at 10 percent or below are not controlling interests and that raising the benchmark to 10 percent will make more capital available to media entities.[20] Paxson Communications Corporation ("Paxson") generally supported an increase in the voting stock benchmark to 25 percent, noting that, as a practical matter, stockholders holding less than this level of interest are not in a position to exercise effective day-to-day control over station operations.[21] CBS, Inc. ("CBS") noted its support for raising the voting stock benchmark but only if the increase is not

[16] *Attribution Notice,* 10 FCC Rcd at 3616.

[17] *Attribution Further Notice*, 11 FCC Rcd at 19912-13.

[18] As noted in *Attribution Further Notice*, 11 FCC Rcd at 19912-13 & n. 60, a majority of commenters in response to the *Attribution Notice* supported an increase to 10 percent but did not provide empirical evidence to support that increase. Also, in response to the *Attribution Notice*, some commenters had urged a higher benchmark than 10 percent. For example, Freedom of Expression Foundation, Inc. ("FOE") urged that the benchmark be raised to at least 10 percent, and to 25 percent in closely-held corporations, The Blackstone Group, M/C Partners and Vestar Capital Partners ("M/C") supported increasing the voting stock benchmarks to 50 percent, and Fox Television Stations, Inc. and Fox Broadcasting Company ("Fox") argued that attribution should be limited to those holding the controlling interests in the licensee. Comments in response to Attribution Notice of FOE at 5; Comments in response to Attribution Notice of M/C at 16; Comments in response to Attribution Notice of Fox at 6.

[19] *See* Comments in response to Attribution Further Notice of the National Association of Broadcasters ("NAB") at 2-3. NAB encloses a statement of an investment analyst that increasing the benchmarks would ease restrictions on broadcast investment. Knight-Ridder, Inc. ("Knight-Ridder") also argues in favor of a 10 percent benchmark, noting that a 10 percent benchmark would adequately protect the integrity of the Commission's multiple ownership rules while providing healthy opportunities for significant broadcast investment. Comments in response to Attribution Further Notice of Knight-Ridder, Inc. at 9.

[20] Comments in response to Attribution Further Notice of TCI at 5-6.

[21] Comments in response to Attribution Further Notice of Paxson at 40.

accompanied by the introduction of a multi-factor analysis making attribution less predictable. CBS added that raising the benchmark would enhance capital flow to the industry, without permitting exercise of undue influence or control.[22] None of these commenters provided the empirical studies requested by the Commission to justify an increase in the benchmark.

9. Some commenters opposed any relaxation of the attribution rules, which include the attribution benchmarks. In its Comments in response to the *Attribution Notice*, the National Association of Black Owned Broadcasters ("NABOB") generally opposed relaxing the attribution rules, arguing that such relaxation would permit increased concentration of broadcast industry control, which works against viewpoint diversity and minority ownership.[23] Press Broadcasting Company, Inc. ("Press") noted that unprecedented consolidation of broadcast ownership has resulted from Congressional relaxation of ownership limitations and argued that the Commission should not encourage further broadcast industry consolidation at this time through modification of the attribution rules. Press urged that consolidation reduces diversity of broadcast voices and that the Commission should therefore not relax the attribution rules, until the effect of the Congressional action is known.[24] BET Holdings ("BET") argued that the Commission should not increase the voting stock benchmark for existing television licensees, allowing incumbent group owners to extend their influence and control, but should increase the voting stock benchmark for new TV and DTV entrants to promote diversity in new entry.[25] Additionally, the National Telecommunications and Information Administration ("NTIA") urged the Commission not to raise the benchmark to 10 percent unless it can determine with confidence that stock ownership of less than 10 percent in a licensee with no majority shareholder does not convey an ability to influence or control the licensee's operations.[26]

10. Decision. We have decided to retain the current active voting stock benchmark at 5 percent.[27] First and most importantly, in reviewing the evidence related to the issue of non-passive voting equity benchmarks, we remain convinced that shareholders with ownership interests of 5 percent or greater may

[22] Comments in response to Attribution Further Notice of CBS at 3-4, 8-9.

[23] NABOB did not mention the benchmark specifically. Comments in response to Attribution Notice of NABOB at 13. Without discussing the attribution benchmarks specifically, The Mid West Family also urged the Commission to retain the current attribution rules. Comments in response to Attribution Notice of Mid West Family at 7.

[24] Comments in response to Attribution Further Notice of Press at 3-4. Indeed, Press urged that any changes in the attribution rules be designed to tighten, not loosen, ownership restrictions while the initial effects of Congressionally-mandated changes in ownership limits are being experienced. *Id.* at 4.

[25] Comments in response to Attribution Further Notice of BET at 3-4.

[26] Letter from Larry Irving, NTIA, to Chairman Reed E. Hundt, dated May 22, 1997 at n. 38 ("NTIA Letter").

[27] We decline to adopt the suggestion of some commenters, such as M/C or Goldman Sachs Group, L.P. ("Goldman"), that voting shareholders that agree to be bound by insulation criteria such as apply to limited partnerships or that certify their non-involvement should be able to qualify for nonattribution. Reply Comments in response to Attribution Notice of Goldman at n. 9; Comments in response to Attribution Notice of M/C at 19. That suggestion is outside the scope of this proceeding and would, moreover, undermine our goal of providing, to the extent possible, bright line attribution standards that promote regulatory certainty.

well be able to exert significant influence on the management and operations of the firms in which they invest. In this regard, we have not been presented with empirical evidence to rebut our conclusion in the *Attribution Order* that a "5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution."[28]

11. In this regard, a growing body of academic evidence indicates that an interest holder with 5 percent or greater ownership of voting equity can exert considerable influence on a company's management and operational decisions. This is particularly true with widely-held corporations where a 5 percent stockholder is likely to be among the largest shareholders in the firm. One recent study demonstrated that block trades involving 5 to 10 percent of the firm's voting stock resulted in a 27 percent turnover rate of the CEO of the traded firm, that a 20 to 35 percent block trade resulted in a 40 percent turnover rate of the CEO of the traded firm, and that block trades over 35 percent of the voting equity resulted in a 56 percent turnover rate.[29] The turnover of the CEO was tracked over a one year period following the date of the trade. These results, spanning an increasing level of ownership starting at 5 percent, demonstrate a consistent relationship between ownership trades and the rate of replacement of top management. The results imply that investors who acquire and hold such large blocks of voting stock can influence the choice of management of the firms in which they invest.

12. Another study presents evidence that 5 percent or greater stockholders vote more actively than less-than-five percent shareholders, and they tend to vote more often against the recommendations of management in votes over corporate anti-takeover amendments.[30] This study suggests that larger owners, starting at a 5 percent level of ownership, tend to be more active in influencing management than smaller owners. The two studies considered together provide evidence that ownership percentages starting at 5 percent can influence management policies and have an impact on firm value.

13. In addition, notwithstanding our requests for empirical evidence, in the *Attribution Notice* and again in the *Attribution Further Notice*, commenters have not provided the kind of specific data to justify raising the non-passive investor benchmark even though they generally supported raising the benchmark. And, while commenters have not provided sufficient empirical evidence to justify raising the active voting stock benchmark, the *Attribution Further Notice* did incorporate and invite comment on a Commission staff study that categorized and quantified attributable interests in commercial broadcast television licensees, as reported in the Ownership Reports that licensees are required to file.[31] Several facts emerge from that study that are relevant to our decision concerning the voting stock benchmarks. First, the study found and reported that increasing the attribution benchmark for non-passive investors from 5 percent to 10 percent would decrease by approximately one third the number of currently-attributable owners. This

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[28] *Attribution Order*, 97 FCC 2d at 1006. In the *Attribution Order*, we noted that, based on our ownership survey, in a widely-held corporation, a 5 percent stockholder is likely to be one of the largest 2 or 3 shareholders, in a preeminent position to command the attention of management, and that a 5 percent benchmark was also appropriate for a closely-held corporation based on several possible ownership scenarios. *Id.* at 1005-08.

[29] L.E. Ribstein, *Business Associations* 987 (1990).

[30] J.A. Brickley, R.C. Lease and C.W. Smith, *Ownership Structure and Voting on Antitakeover Amendments*, 20 Journal of Financial Economics 267-291 (1988).

[31] *Attribution Further Notice*, 11 FCC Rcd at Appendix B.

increase in the non-passive investor benchmark would also increase from 81 to 134 the number of stations (out of 389 commercial for-profit television stations studied that are incorporated and are not single majority shareholder stations), for which no stockholders and only officers and directors would be held attributable. These large potential changes in the number of attributable owners heighten our concern about the impact of raising the 5 percent benchmark. In light of the lack of sufficient evidence that such an increase is necessary or appropriate, we are reluctant to institute a change that would have such a major impact.

14. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. For example, communications transactions increased by 38 percent during 1996, with the total value of mergers, acquisitions, share offerings and other deals totalling $113 billion.[32] Within the communications sector, TV transfers of ownership in 1996 increased by 121.26 percent in dollar terms over 1995 figures, and FM and AM transfers increased by 283.27 percent and 99.34 percent, respectively. In total, dollars spent on radio and television transactions increased from $8.32 billion in 1995 to $25.362 billion in 1996, with the number of transactions increasing from 849 to 1115 over the same period. Station trading remained strong in 1997, with a total of 1067 radio and television transactions worth $23.44 billion. In 1998, the total number of radio and television transactions fell slightly, as a result of the slower pace of radio consolidation, to 950 transactions, with the value of these transactions remaining fairly stable at $22.8 billion.[33] This overall increase in capital spending from 1995 to 1998 occurred while our current attribution rules were in effect, and therefore provides us with strong evidence that those rules do not impede the availability of capital in the communications industry. And, to the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed by our increase in the passive investor benchmark. In sum, in reviewing the overall body of evidence on this issue, we believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability.

15. Finally, retention of the 5 percent benchmark remains consistent with the SEC's analogous 5 percent benchmark. Pursuant to Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1), any person who becomes a direct or indirect owner of more than 5 percent of any class of stock of a company through a stock acquisition must file a statement with the Securities and Exchange Commission (SEC). The purpose of this reporting requirement is generally to ensure that investors are alerted to potential changes in control.[34] The broadcast attribution rules have a similar objective as they are intended to identify ownership interests that confer on their holders the potential to influence or control a licensee's

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[32] Financial Times, April 10, 1997, at 37.

[33] *Broadcasting & Cable*, February 3, 1997, at 19; *Broadcasting & Cable*, February 2, 1998, at 34; *Broadcasting & Cable*, February 15, 1999, at 33.

[34] *See Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149 (1978), *cert. denied* 99 S.Ct. 1227 (1979).

day-to-day operations.[35]

2. *Passive Investor Benchmarks*

16. Comments. Most commenters that responded to this issue favored raising the passive investor benchmark. ALTV urged the Commission to increase the benchmark to 20 percent.[36] CG asserted that the growth in stock mutual funds has exceeded the growth of capital markets in general, and that the current 10 percent benchmark has been a barrier to further investment by this rapidly growing sector. CG additionally noted that the vast majority of mutual funds have adopted restrictions against investing for purposes of management or control.[37] Investment Company Institute ("ICI") similarly pointed to the rapid growth in mutual fund assets over the past several years, and argued that mutual fund policy and conduct have given little cause for concern over their exerting influence or control.[38] NAB argued that an increase in the passive investor benchmark carries no risk that institutions will control broadcast stations without the Commission's knowledge because licensees with large institutional investors will continue to be required to certify that they have not sought to exercise control in order for the higher attribution benchmark to apply.[39] Paxson urged the Commission to increase the passive investor benchmark to 25

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[35] In the *Attribution Notice*, we invited comment on the significance of other agency benchmarks. We now believe that these other benchmarks are inapposite. We disagree with those commenters who argue that the attribution rules are more appropriately analogized with those other federal rules that use benchmarks higher than 5 percent. Comments of The Association of Independent Television Stations, Inc., now the Association of Local Television Stations ("ALTV") at 4; Reply Comments of ALTV at 3-4; Comments of Capital Group Companies ("CG") at 3-4; Comments of Tribune Broadcasting Company ("Tribune") at 22-24. While our rules are intended to identify all interests that confer the potential to influence day-to-day operations, the regulations they cite have different goals. For example, some reporting requirements have the more limited purpose of identifying only those interests conveying a *substantial* ability to influence or control an entity, as opposed to our criteria, which are not necessarily limited to influence or control that is substantial in nature. *E.g.*, 14 C.F.R. §§ 204.2(l)(3), 204.5 (Department of Transportation), 49 C.F.R. § 1201.5-2(b)(1) (Surface Transportation Board). Others are intended to prevent intrinsically illegal or undesirable activities. *E.g.*, 15 U.S.C. § 78p(b) (SEC's insider trading prohibitions); 15 U.S.C. § 18a (Federal Trade Commission and Department of Justice antitrust prohibitions). We continue to believe that the SEC's 10 percent benchmark is inapposite. As we have stated with respect to the SEC's 10 percent "insider trading" benchmark, among other agency benchmarks, the:

> unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities. The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities seem inappropriate models where, as here, the activity at issue -- influencing a licensee's programming decisions -- is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

Attribution Order, 97 FCC 2d at 1010.

[36] Comments in response to Attribution Notice of ALTV at 6-7.

[37] Comments in response to Attribution Notice of CG at 3.

[38] Comments in response to Attribution Notice of ICI at 2.

[39] Comments in response to Attribution Further Notice of NAB at 3.

percent, urging that stockholders holding less cannot exercise day-to-day control over station operations.[40] For similar reasons, TCI urged an increase in the passive investor benchmark to 49 percent.[41] In contrast, as discussed above, Press generally opposed relaxation of the attribution rules at this time.[42]

17. Decision. We will increase the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital,[43] while preserving the Commission's ability to enforce its ownership rules effectively. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest.

18. We believe that we can increase the passive investor benchmark without incurring substantial risk that investors who should be counted for purposes of applying the multiple ownership rules will avoid attribution. As we have stated:

> passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest. To ensure that these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation. (footnotes omitted)[44]

19. Despite recognizing these principles, we have not previously had sufficient evidence to justify raising the passive investor benchmark and have sought additional assurance and evidence of the passivity of such investors and of the positive impact on investment of an increase in the benchmark.[45] We have, however, become convinced that an increase in the passive investor benchmark is warranted at this time. Clearly, passive investors continue to face multiple constraints on their ability to become directly involved

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[40] Comments in response to Attribution Further Notice of Paxson at 40.

[41] Comments in response to Attribution Further Notice of TCI at 6-8.

[42] Comments in response to Attribution Further Notice of Press at 3-4.

[43] While we note that our concerns as to capital availability have eased somewhat, we also recognize that funding the transition to DTV will increase the level of future capital needs required by broadcasters, which may then require access to new or increased sources of investment capital. We believe that raising the passive investor benchmark is a safer way to accommodate such needs than raising the active investor benchmark.

[44] *Attribution Notice*, 10 FCC Rcd at 3628, *citing Attribution Order*, 97 FCC 2d 1012-14. We also noted that, as an additional safeguard, our Ownership Report, Form 323, Instruction 6, requires the licensee to certify that such (purportedly passive) entities exercise no influence over the corporation, directly or indirectly, and have no representatives among the officers and directors of the corporation. *Attribution Notice*, at n. 92.

[45] *Attribution Notice*, 10 FCC Rcd at 3629-30; *Attribution Further Notice*, 11 FCC Rcd at 19912-13.

with the management and operations of the firms in which they invest, including statutory and regulatory restrictions as well as fiduciary obligations.[46]

20. In setting the limit at 10 percent, we noted that an increase above 10 percent was not advisable at that time based on our concern about the impact on corporate management that could result, even unintentionally, from the trading and voting of large blocks of stock by purportedly passive investors.[47] We have not been presented with any evidence to indicate that our ten percent benchmark has resulted in any such block trading problems. Further, as TCI noted in its Comments, if passive investors vote or trade or threaten to vote or trade their shares in an attempt to control a media entity, that action would violate the Commission's rules concerning their passivity. Moreover, any inadvertent effect of a passive investor's decision to sell its stock, for example, because it is dissatisfied with the return on its investment, simply reflects the marketplace at work, and a responsive action by management to make the entity more profitable in response to a sale is simply an appropriate reaction to market demands.[48]

21. While we note that our concerns about capital availability have eased somewhat, to the extent that these concerns remain, particularly based on funding needs related to the conversion to digital television, we believe that increasing the passive investor benchmark is a relatively safe way to facilitate such further investment in broadcasting, without compromising the ability of our attribution rules to capture influential interests.[49] Raising that benchmark will reduce barriers to investment in broadcasting and result in greater efficiencies in the use of capital. Both CG and ICI, for example, commented on the

[46] In particular, life insurance companies face multiple constraints under state law that insure the passivity of their investments. For example, New York state insurance law applies to any life insurance company that operates in New York state, and limits its investment in non-New York subsidiaries to 5 percent of its total assets. Under this law, a subsidiary is broadly defined as "any firm for which the insurer has 'possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [that firm], whether through the ownership of voting securities, by contract or otherwise.'" M.J. Roe, *Strong Managers, Weak Owners*, Princeton University Press 88 (1994). Therefore, the state law imposes reasonably stringent limits on the ability of life insurance companies to exert influence or control over those companies they invest in, without having those investments fall within the 5 percent of total assets limits. Mutual funds also face multiple constraints in the form of Subchapter M Internal Revenue Code restrictions (with key tax provisions at I.R.C. §§ 243, 1201, and 7704(c)) that require mutual funds to be broadly diversified to avoid corporate taxation, and fiduciary constraints imposed under the Investment Company Act of 1940 and its amendments.

[47] *Attribution Notice*, 10 FCC Rcd at 3628-29; *Attribution Order*, 97 FCC 2d at 1013.

[48] Comments in response to Attribution Further Notice of TCI at 7-8.

[49] The staff study attached to the *Attribution Further Notice* had the following findings with respect to passive investors. First, the study indicates that 28 passive investors have interests in the 5 percent to 10 percent ownership range, which is just below the current benchmark cutoff. NAB noted that this may indicate that relaxing the benchmark for passive investors would encourage greater passive investment in broadcasting. Comments in response to Attribution Further Notice of NAB at 3-5. Furthermore, the study indicates that the proposed relaxation of the passive-investor benchmark from 10 percent to 20 percent would affect 5 of the 13 currently attributable interests in this category. While this is a relatively high percentage, the actual number of interests affected would be small, far smaller than the number of investors that might be affected by a change in the active investor benchmark.

rapid growth of passively-managed funds over the last decade.[50] ICI also noted that since the broadcast attribution rules aggregate the holdings of funds under common management, the 10 percent benchmark can readily become a barrier for further mutual fund investment in broadcasting.[51] Both CG and ICI cited restrictions that limit the involvement of mutual funds in the operations of their investments and argued that increasing the benchmark would lead to a growth in passive investments in broadcasting.[52]

22. As discussed above, we have been requested by some parties to raise the benchmark even higher than 20 percent. We decline to do so. Although passive investors are subject to constraints that limit their ability and incentive to become actively involved in the management and operations of the firms in which they invest, we believe that we should nonetheless act cautiously in raising the benchmark to ensure that our relaxation does not serve to undermine the purposes of the attribution rules. In this regard, as noted by FOE, the voting stock held by passive investors could become decisive in proxy disputes, and passive investors cannot therefore be considered as equivalent to limited partners or non-voting shareholders.[53] Should our experience with a 20 percent benchmark suggest that even further relaxation might be advisable, we can address that issue at an appropriate time.

3. *Definition of Passive Investors*

23. Background. In response to the *Capital Formation Notice*, several commenters raised the issue as to whether the Commission should expand its definition of "passive investors" to include such institutional investors as pension funds, commercial and investment banks, and certain investment advisors. These commenters argued that these largely institutional investors invest primarily for reasons of financial returns, rather than to exert significant influence or control, and therefore their interests should be treated as passive investments. In the *Attribution Notice*, the Commission stated that it did not intend to revisit its 1984 decision, which defined the passive-investor category to include only bank trust departments, insurance companies and mutual funds, and we tentatively concluded that we would not expand the passive investor category to include Small Business Investment Companies ("SBICs") and Special Small Business Investment Companies ("SSBICs"),[54] as we had not been able to conclude that these entities met our definition of "passive." Nonetheless, we invited further comment on these tentative conclusions.[55]

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[50] Comments in response to Attribution Notice of ICI at n. 3; Comments in response to Attribution Notice of CG at 2.

[51] Comments in response to Attribution Notice of ICI at 1-2.

[52] Comments in response to Attribution Notice of CG at 2-3; Comments in response to Attribution Notice of ICI at 2.

[53] Comments in response to Attribution Notice of Freedom of Expression Foundation ("FOE") at 6.

[54] As we noted in the Capital Formation Notice, the Small Business Administration licenses Small Business Investment Companies and Special Small Business Investment Companies (formerly known as Minority Enterprise Small Business Investment Companies) to act as vehicles through which it provides advisory services and venture capital in the form of equity financing and long-term loan funds to small business and minority-owned concerns. *Capital Formation Notice*, 7 FCC Rcd at 2656.

[55] *Attribution Notice*, 10 FCC Rcd at 3630-3631.

24. Comments. Several commenters, including California Public Employees' Retirement System ("CalPERS"), Communications Corporation of America ("CCA"), CG, ICI, ALTV and M/C, urged the Commission to expand its passive investor category. CG, ICI and M/C argued that investment advisors should be included in the expanded definition.[56] ALTV, however, disagreed, stating that an investment advisor could work on behalf of an entity or individual that has a strong interest in the day-to-day operations of a broadcast station. ALTV supported broadening the definition to include commercial banks, arguing that the Commission has failed to justify their exclusion.[57] Capital Cities/ABC, Inc. ("Capital Cities/ABC"),[58] proposed that other investment entities, including SBICs and SSBICs, pension funds, and investment and commercial banks should be incorporated in the passive investor category so long as they met the passivity standard currently applied to the approved types of passive investors.[59] Finally, CalPERS urged the Commission to include pension funds in the passive investor category, or in lieu of their inclusion, argued that pension funds should be allowed higher levels of non-attributable investments if they certify their non-involvement in the media operations of firms in which they invest.[60]

25. Decision. We reaffirm our earlier decision to retain the current definition of "passive investors," which is limited to bank trust departments, insurance companies and mutual funds. We noted that we earlier stated that we "do not intend to revisit our decision of 1984 in order to broaden the category of passive investors...."[61] We are not convinced that other types of investors lack the interest and/or the ability to actively participate in the affairs of the firms in which they invest. This is particularly true of public pension funds, many of which have apparently become increasingly active in proxy fights and other devices to put pressure on management perceived to be underperforming.[62] Furthermore, commercial and investment bank activities do not fall under the same fiduciary restrictions, discussed above, that apply to bank trust departments. And, we have not been presented with sufficient evidence thus far to revise our earlier tentative conclusion not to include SBICs and SSBICs in the definition of passive investors.[63] As we have noted, under certain circumstances, these entities are

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[56] Comments in response to Attribution Notice of Capital Cities/ABC at 7; Comments in response to Attribution Notice of CalPERS at 18-22; Comments in response to Attribution Notice of CCA at 3-6; Comments in response to Attribution Notice of CG at 1; Comments in response to Attribution Notice of ICI at 3; Comments in response to Attribution Notice of ALTV at 6; Comments in response to Attribution Notice of M/C at 20.

[57] Comments of in response to Attribution Notice of ALTV at 6.

[58] Capital Cities/ABC is now ABC, Inc. ("ABC").

[59] Comments in response to Attribution Notice of Capital Cities/ABC at 6-7.

[60] Comments in response to Attribution Notice of CalPERS at 18-22.

[61] *Attribution Notice*, 10 FCC Rcd at 3630-31.

[62] M.J. Roe, *Strong Managers, Weak Owners* 125 (1994). In the *Attribution Order*, we declined to classify pension funds as passive investors based on evidence that pension funds manage their own investments and actively pursue social goals in their investment policies. *Attribution Order*, 97 FCC 2d at 1014-15.

[63] In the *Attribution Order*, we declined to accord passive status to SBICs and MESBICs, noting the absence of compelling reason to alter the 5 percent benchmark for these entities and the fact that while these entities are generally prohibited from assuming control of the companies in which they invest, they are authorized to exercise

authorized to exercise control over debtor companies for temporary periods.[64] Finally, we agree with ALTV that an investment advisor, acting on behalf of its client, might exert the same level of influence or control as the client might exert on its own accord. Therefore, unlike the categories currently defined as passive investors, we do not find evidence of regulatory or other safeguards ensuring that the other types of investors proposed to be included will remain passive. While several commenters favored expanding the definition of the passive investor category, they did not supply persuasive evidence or analysis to support their case and, in particular, to contradict evidence that these institutional investors can be actively involved in the companies in which they invest.

B. **Equity/Debt Plus and Attribution Exemptions**

1. *Background*

26. In the *Attribution Notice*, we invited comment as to whether multiple cross-interests or currently nonattributable interests, when held in combination, raise diversity and competition concerns warranting regulatory oversight.[65] We anticipated that any regulation of such inter-relationships would require case-by-case review of applications, but we did not otherwise delineate specific proposals to address these concerns. We also invited comment as to whether to restrict or eliminate the current nonvoting stock and single-majority shareholder attribution exemptions, expressing concerns that some interest holders that are eligible for these exemptions might nonetheless exert significant influence such that the interest should be attributed.[66]

27. In the *Attribution Further Notice*, we proposed to adopt a targeted equity/debt plus ("EDP") attribution approach to deal with the foregoing concerns. We noted that our proposed new EDP rule[67] would operate in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address our concerns about multiple nonattributable relationships, and respond to concerns about whether the single majority shareholder and nonvoting stock attribution exemptions were too broad. This approach would not eliminate the nonvoting and single majority shareholder exemptions from attribution, but would limit their availability in certain circumstances. Under this approach, we proposed to attribute the otherwise nonattributable debt or equity interests in a licensee where: (1) the interest holder was also a program supplier to the licensee or a same-market broadcaster or other media outlet subject to the broadcast cross-ownership rules, including newspapers and cable operators; and (2) the equity and/or debt holding exceeds 33 percent. Under our EDP proposal, a finding that an interest is attributable would

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control over debtor companies for temporary periods under specified conditions. *Attribution Order*, 97 FCC 2d at 1016-17 & n. 45.

64 *Attribution Notice*, 10 FCC Rcd at 3631, *citing Attribution Order*, 97 FCC 2d at 1016 & n. 45.

65 *Attribution Notice*, 10 FCC Rcd at 3649.

66 *Attribution Notice*, 10 FCC Rcd at 3631-33. Pursuant to the current attribution rules, minority stockholdings in corporations with a single majority shareholder are not attributable. Also nonattributable are nonvoting stock, other nonvoting instruments such as options or warrants, and debt. 47 C.F.R. § 73.3555 Note 2(b) & (f).

67 We will refer to the standard as either "equity or debt plus," or "equity/debt plus" interchangeably.

result in that interest being counted for all applicable multiple ownership rules, local and national.[68]

2. *Comments*

28. Single Majority Shareholder and Nonvoting Stock Attribution Exemptions. As discussed in the *Attribution Further Notice*, most commenters in response to the *Attribution Notice* urged us to retain the single majority shareholder and nonvoting stock attribution exemptions, but network affiliates have expressed concerns that the exemptions have allowed networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence if not control over licensees.[69]

29. Propriety of EDP Rule. Commenters filing in support of the EDP proposal included Media Access Project ("MAP"), Network Affiliated Stations Alliance ("NASA"), representing affiliates of the three major networks, Viacom, Inc. ("Viacom"), Knight-Ridder and Paxson.[70] NASA noted that current attribution rules "allow networks to evade the intent and spirit of the Commission's ownership rules."[71] According to NASA, networks can use non-attributable investments to create fiduciary obligations that might require the station owner to favor the network or as a quid pro quo for long-term affiliation agreements.[72] Knight-Ridder, a newspaper publishing company, supported the equity/debt plus proposal as a bright line attribution test, which would allow greater certainty and predictability in transactions and be preferable to the *ad hoc* cross-interest policy. Knight-Ridder also noted that the EDP approach would prevent abuses of the single-majority shareholder and non-voting stock exemptions.[73] Viacom strongly supported the Commission's "equity or debt plus" proposal and, indeed, argued that it should be tightened.[74] MAP supported an equity/debt plus rule but also argued for a tighter rule than that proposed

[68] *Attribution Further Notice*, 11 FCC Rcd at 19901-02.

[69] *Attribution Further Notice*, 11 FCC Rcd at 19900-01.

[70] Media Access Project *et al* includes the Media Access Project, Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Telecom Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, and Women's Institute for Freedom of the Press. NASA, according to its Comments at 1, consists of the ABC Television Affiliates Association, the CBS Television Affiliates Association, and the NBC Television Affiliates Association.

[71] Comments in response to Attribution Further Notice of NASA at 2.

[72] *Id.* at 3.

[73] Comments in response to Attribution Further Notice of Knight-Ridder at 3. As noted below, however, Knight-Ridder urged the Commission not to classify newspapers as either same-market media broadcasters or program suppliers.

[74] Comments in response to Attribution Further Notice of Viacom at 5. Viacom observed that the Commission, when adopting its current attribution rules, did not contemplate that non-voting stockholders and the licensee could, and would, enter into corollary written or unwritten agreements, including network affiliation agreements, which would permit the contracting parties to participate in the programming and/or core functions of the licensee. *Id.*

by the Commission. MAP argued that the proposal, as a bright line test, is superior to a case-by-case approach, and that the Commission's proposal avoided unduly disrupting capital flow because it did not fully repeal the nonvoting shareholder and single majority shareholder attribution exemptions, and, specifically, would not discourage investors from assisting in the conversion to digital television.[75] Additionally, NTIA generally supported the proposal but asked the Commission to consider refinements "so that all relationships providing the ability to exercise significant influence are recognized and attributed."[76] The Department of Justice, Antitrust Division ("DOJ"), supported the proposed EDP rule and suggested that the Commission retain the flexibility to address other relationships that, combined with equity or debt interests below the applicable threshold, confer significant control and influence.[77] Finally, while CBS opposed adoption of the equity/debt plus proposal, it noted that the proposal would be preferable to continued use of the "amorphous" cross-interest policy.[78]

30. Opposition to the "equity or debt plus" proposal was voiced by ABC, Pappas Stations Partnership ("Pappas"), and TCI, among others, which argued that it was overly broad. While ABC agreed that the current attribution rules could be subject to abuse by parties that structure transactions to avoid attribution while retaining control, it argued that instead of adopting the equity/debt plus proposal, the Commission should apply a rebuttable presumption of attribution for an investment or equity stake over 50 percent.[79] TCI argued that the equity/debt plus proposal is overinclusive insofar as it would apply

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Where there is no investment contract that expressly prohibits the investor's influence on the station's programming, programming personnel, or budget, Viacom argued for application of a ten percent benchmark; where there is such a contract, Viacom favored the 33 percent benchmark. Comments in response to Attribution Further Notice of Viacom at 3.

[75] Comments in response to Attribution Further Notice of MAP at 7-20. MAP argued, however, for an additional threshold, under which if an entity holds interests in any two categories that exceed two-thirds of the threshold percentage (22 percent if the threshold percentage is 33 percent), the interests should be attributed. Additionally, MAP argued that the 33 percent threshold is too high and advocated a 20 percent benchmark instead. *Id.*

[76] Letter from Larry Irving, NTIA, to Chairman Reed E. Hundt, Federal Communications Commission, dated May 22, 1997. NTIA suggests that the Commission not establish triggering relationships but rather identify interests or relationships that would enable an investor to exert influence even if it does not have voting control regardless of the size of the investment or the nature of the investment. According to NTIA, these include participating in the programming of the licensee, influencing the choice of programming personnel, and affecting the licensee's budget, as well as other interests it asks the Commission to identify and enumerate. NTIA also suggests a 20 percent threshold for debt.

[77] Letter to Reed E. Hundt, Chairman, Federal Communications Commission from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, dated May 8, 1997 ("DOJ Letter").

[78] Comments in response to Attribution Further Notice of CBS at 3, 6. CBS stated that: "Assuming the threshold triggering attribution is set at 33 percent and the definition of 'program supplier' for purposes of the rule is sufficiently broad so as not to discriminate against broadcast networks, fair and predictable application of the proposal appears possible." Comments in response to Attribution Further Notice of CBS at 6.

[79] Comments in response to Attribution Further Notice of ABC at 3-9; Reply Comments in response to Attribution Further Notice of ABC at 8-9.

to debt.[80] Pappas argued for retention of the current case-by-case approach of reviewing contractual language in those cases involving nonattributable interests that raise control questions.[81] Tribune also opposed adoption of the proposed rule, arguing that there has been no finding that the single majority shareholder or nonvoting stock exemptions have resulted in even a single instance of unauthorized transfer of control or the exercise of undue influence over the affairs of a broadcast outlet, and that, under the proposal, capital availability would be greatly restricted, particularly to small and minority broadcasters, the entities that need capital the most, as broadcasters enter the transition to DTV, which will require large amounts of capital.[82]

31. Scope of Rule. MAP urged that the EDP rule should encompass same-market media entities, including cable operators and daily newspapers, as well as program suppliers. According to MAP, the incentive and ability for cable operators and newspapers to exercise influence are nearly the same as for broadcasters.[83] However, Paxson argued that newspapers or cable systems should not be included, since rules already exist restricting cross-ownership by those entities, and an equity/debt plus gloss would make these "onerous existing regulations even more burdensome."[84] Knight-Ridder also argued that newspapers should not be subject to the EDP rule, noting that as competition for viewers has increased, newspapers have sought to work more closely with broadcasters in producing news reports, documentaries and other public service programs to realize synergies between print and broadcast newsgathering operations, and that the explosion of services means that the concern about diversity that underlies the cross-ownership rules is now a thing of the past. Knight-Ridder asked that if the Commission believes that the EDP rule should apply to the broadcast-newspaper cross-ownership rule, it should at least defer any decision to include newspapers as same-market broadcasters until the next mandated review of the broadcast-newspaper cross-ownership rule. Knight-Ridder also argued that if the Commission does include

[80] According to TCI, debt interests only raise concerns when they are accompanied by overreaching provisions, such as those ceding to the creditor operational decision-making authority or the right to participate proportionately in profits. Comments in response to Attribution Further Notice of TCI at 12.

[81] Comments in response to Attribution Further Notice of Pappas at 3-4. Pappas argued that the proposed rule is overbroad and that there is no finding that standing alone, the financial arrangements arousing the Commission's concern have resulted in an unauthorized transfer of control of any broadcast station or record of systemic abuse of financing to exercise influence over broadcast outlets. Comments in response to Attribution Further Notice of Pappas at 2; Reply Comments in response to Attribution Further Notice of Pappas at 1-4.

[82] Reply Comments in response to Attribution Further Notice of Tribune at 20-21. Other commenters, including BET Holdings Inc. ("BET"), and Qwest Broadcasting L.L.C. ("Qwest"), opposed the "equity or debt plus" approach on the grounds that it would chill investment for new TV and DTV entrants, including minorities, while Fox Broadcasting Company ("Fox"), Pappas, and TCI argued that the proposal would unduly restrict the flow of capital to broadcast entities, including capital needed for digital conversion. Comments in response to Attribution Further Notice of BET at 2-3; Reply Comments in response to Attribution Further Notice of BET at 2-5; Reply Comments in response to Attribution Further Notice of Qwest at 2, 7-8; Comments in response to Attribution Further Notice of Pappas at ii, 1-2; Reply Comments in response to Attribution Further Notice of Pappas at 7-9; Comments in response to Attribution Further Notice of Fox at 3; Comments in response to Attribution Further Notice of TCI at 12.

[83] Comments in response to Attribution Further Notice of MAP at 7-20.

[84] Comments in response to Attribution Further Notice of Paxson at 40.

newspapers as same-market media entities, it should apply the same definition of "market" as used for the underlying cross-ownership rule, in order to minimize confusion among the regulated parties.[85]

32. Fox opposed application of the equity/debt plus proposal to program suppliers, noting that it would deprive local broadcast outlets of needed capital and limit the ability of program suppliers to make needed investments in their distribution infrastructure, thereby undermining the goals of competition and diversity.[86] TCI and BET also opposed applying the proposal to program suppliers.[87] BET noted that new entrants, particularly in DTV where programming may be scarce, need flexibility to form joint ventures with program suppliers to enter the DTV market.[88]

33. Definition of Program Supplier. CBS and MAP argue for a broader definition of program supplier. CBS argued that any supplier of 20 percent or more of the licensee's prime-time programming should be defined as a program supplier under the proposed rule and that the attribution rules should be applied in determining how great an interest in a program supplier a person or entity can hold without being deemed a program supplier for purposes of applying an equity/debt plus rule. MAP also argued that program suppliers should include networks, syndicators, program producers, and program providers pursuant to LMAs.[89]

34. Most commenters addressing this issue, however, argued for a narrower definition of program supplier. Paxson argued that the Commission should limit the "equity or debt plus" standard to the four

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[85] Comments in response to Attribution Further Notice of Knight-Ridder at 1-2, 3-6.

[86] Comments in response to Attribution Further Notice of Fox at 2-3. Fox argued that network investment in affiliates may be the only way that it and other newer networks can strengthen weak affiliates to the point where they can compete effectively in their markets. According to Fox, the equity/debt plus approach is not needed because of the competitive environment in broadcasting and because the "option time" and the "right to reject" network rules prevent overreaching. Comments in response to Attribution Further Notice of Fox at 3-7. HSN Inc. ("HSN") agreed. Comments in response to Attribution Further Notice of HSN at 13-15. According to HSN, proponents of the EDP standard have not established that the theoretical harm of permitting such investments outweighs its demonstrable public interest benefits of encouraging investment in programming. Reply Comments in response to Attribution Further Notice of HSN at 7-8. In addition, Fox argued that the Commission, in implementing an equity/debt plus standard, would be overlooking relationships, such as affiliation agreements or contracts with lenders, that confer a similar level of influence as those relationships the proposed rule would capture and that the Commission has failed to identify a sufficient rationale for treating non-controlling equity or debt interests held by program suppliers more restrictively than other kinds of business relationships. Comments in response to Attribution Further Notice of Fox at 4-5. While Fox does not contend that its relationships do not confer influence, it argues that only those relationships that confer control should be attributed. Reply Comments in response to Attribution Further Notice of Fox at 1-5.

[87] TCI noted that multiple non-attributable interests should be treated on a case-by-case basis and that in most cases such interests do not pose any reasonable chance to exercise control or harm competition and diversity. Comments in response to Attribution Further Notice of TCI at 19-20.

[88] Reply Comments in response to Attribution Further Notice of BET at 4-5.

[89] Comments in response to Attribution Further Notice of CBS at 7 & n. 14; Comments in response to Attribution Further Notice of MAP at 15.

major networks because they have historically exercised extraordinary influence over their affiliates.[90] King World Productions, Inc. ("King") argued that the definition should be limited to networks as defined by Section 73.658(g)(1) of the Commission's rules.[91] NASA agreed that "program suppliers" should include only networks as defined by former Section 73.662(f) of the Commission's rules (15 hours of prime time programming/75 percent of households), and other suppliers that provide substantial quantities of programming to licensees.[92] Tribune suggested that "program supplier" should be narrowly defined so as not to include syndicators that typically sell programming in separate transactions to a variety of stations within and across markets, because they have neither the means nor the incentive to control their distribution networks, and that the term should apply only to those entities that exercise control over the operations of the program supplier.[93] And, Viacom argued that syndicators should be distinguished from both networks and LMA brokers, with the networks and LMA brokers subjected to a lower capitalization benchmark.[94]

3. *Decision*

35. Overview. As we noted in the *Attribution Further Notice*, the relaxation of the multiple

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[90] Comments in response to Attribution Further Notice of Paxson at iv, 39. Paxson suggested a 25 percent "equity or debt plus" attribution benchmark for the networks and their controlling entities.

[91] Comments in response to Attribution Further Notice of King at 5. Under Section 73.658(g)(1), 47 C.F.R. § 73.658(g)(1), "the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by or under common control with such person, entity, or corporation... ."

[92] Comments in response to Attribution Further Notice of NASA at 7.

[93] Reply Comments in response to Attribution Further Notice of Tribune at 22. While Tribune would support an actual control standard for purposes of determining when entities with interests in program suppliers should be deemed to be "program suppliers' for purposes of applying the proposed standard, for administrative convenience, it would also support application of the attribution rules to make this determination. *Id.* at 22-23.

[94] Comments in response to Attribution Further Notice of Viacom at 10. Viacom proposed that a network should be defined as an entity engaging in program distribution of more than two consecutive hours of programming which is required to be broadcast by a licensee in pattern with other licensees (allowing for time zone differences) where such in-pattern requirements apply to television stations serving 75 percent of total U.S. households. *Id.* It urged that a broadcast "network" be defined to include ABC, CBS, NBC, and Fox, as well as nascent networks, such as UPN (which is 50-percent-owned by Viacom), WB, the home shopping broadcast networks, such as HSN and ValueVision, and the foreign-language broadcast networks, Univision and Telemundo. Program producers and syndicators would not be considered networks. Reply Comments in response to Attribution Further Notice of Viacom at 3. Additionally, Viacom argued that any entity or person who holds a 10 percent or greater voting interest or whose investment in a network equals at least 10 percent of total capitalization of the network should be deemed a network, and that a key officer or director of a network should also be deemed a network. Moreover, Viacom suggests that investments in stations by an officer or director of a network be attributable not only to the individual but presumptively to the network. Comments in response to Attribution Further Notice of Viacom at 11. Viacom argued that the network-affiliate relationship is unique among all licensee relationships and that the network is the lifeblood of the station and that the EDP proposal is therefore the correct guideline to identify those interests with a realistic potential to affect programming decisions.

ownership rules resulting from the 1996 Act requires neither relaxation nor tightening of our attribution rules but does underscore the importance of maximizing the precision of the attribution rules.[95] We should take care in enforcing the multiple ownership limits, which have been deliberately set at certain levels, to ensure that the attribution rules neither unduly loosen nor restrict those limits, but rather apply them with the greatest precision to entities that have the power to influence a licensee's operations. We have been mindful of this goal in the decisions that follow.

36. We will not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice*, we will adopt our equity/debt plus attribution proposal, modified as discussed herein, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a "major program supplier," as defined herein to include all programming entities (including networks and inter-market time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours,[96] or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee or other media entity in that market will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total asset value (equity plus debt) of the licensee or media entity. As a shorthand, we will use the term, "total assets," herein to refer to the total asset value of the licensee. In the case of a major program supplier, the EDP rule will apply and the interest will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided. A finding that an interest is attributable under EDP would result in attribution for purposes of applying all relevant multiple ownership rules, local and national, except that, as discussed in the *TV National Ownership Order*, we will not double-count same-market TV stations towards application of the national TV ownership rules.

37. We will define equity to include all stock, whether common or preferred and whether voting or nonvoting. We will also include equity held by insulated limited partners in limited partnerships. Debt includes all liabilities, whether short-term or long-term. Total assets, by definition, is equal to the sum of all debt plus all equity.[97] Finally, an interest that is attributable pursuant to the EDP rule will count in determining compliance with all applicable ownership rules, national as well as local.

38. We note that parties, such as ABC, while agreeing that our current attribution rules are subject to abuse and that revision is necessary, argued for a 50 percent attribution benchmark test instead, based on a control concept, or in the alternative that the EDP rule should not be adopted because the kinds of relationships it would reach do not confer control. Parties have similarly argued that there is no evidence of unauthorized transfer of control in such relationships. However, attribution is not limited to relationships that permit control, but also extends to relationships that permit sufficient influence over core operations of the licensee such that they should be subject to the multiple ownership rules. We believe that the EDP standard will address such relationships that may inappropriately avoid attribution under our

[95] *Attribution Further Notice*, 11 FCC Rcd at 19898-99.

[96] The 15 percent programming benchmark is the same standard now used as a threshold to attribute radio LMAs and is also adopted in this Report and Order as the standard to be used to determine whether to attribute TV LMAs. *See* Section III.C. *infra*.

[97] Pursuant to standard financial accounting practices, the left-hand side of the balance sheet (or total assets) equals the right-hand side of the balance sheet (or debt plus equity).

current rules.

39. The equity/debt plus approach is intended to resolve our concerns, expressed in the *Attribution Notice*, that multiple nonattributable business interests could be combined to exert influence over licensees.[98] As we stated in the *Attribution Notice*, we are concerned that our nonvoting stock, single majority shareholder, and debt attribution exemptions can permit nonattributable investments that could carry the potential for influence such that they implicate diversity and competition concerns and should be attributed. The record in this proceeding, including comments filed in response to the *Attribution Notice* and to the *Attribution Further Notice*, amply underscores the need to increase the precision of the attribution rules by adopting an equity/debt plus standard. In this regard, NASA, MAP, and Viacom have supported adoption of an EDP rule.[99]

40. Fox argued that none of the proponents of the EDP rule have "clearly identified the harmful conduct -- an amorphous concept of undesirable 'influence' -- that needs to be remedied by the proposed standard, or demonstrated how it will alleviate those harms." According to Fox, unless they do so, the Commission should refrain from increasing restrictions on broadcast ownership.[100] Fox cited *NAACP v. FCC*, 682 F.2d 993, 1000-01 (D.C. Cir. 1982) and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) for the proposition that the Commission can not regulate unless it can identify the "harm" to be remedied.[101] However, the Commission has identified the potential harm it seeks to remedy. The current attribution exemptions are too broad with respect to certain currently non-attributable interests held by major program suppliers and same-market broadcasters, thus permitting them to wield a level of influence that should be subject to limitation by the multiple ownership rules. A holding that such an interest should be attributable does not rest on a specific finding that it is harmful *per se*, but rather on a finding that it is the sort of interest that should be counted in applying the multiple ownership rules. It is the multiple ownership rules, not the attribution rules, that determine how many and what kinds of interests in stations can be combined before harm to diversity and competition results. The finding necessary for attribution relates to the finding of control or influence over the core operations of the licensee.

41. The EDP rule addresses the most serious concerns we raised in the *Attribution Notice* and *Attribution Further Notice* concerning the underinclusiveness of the attribution rules, particularly those that were supported in the record. Based on the record, we have targeted our remedy and focused those concerns in shaping the EDP rule. For example, except in cases involving a same-market media entity or major program supplier, as defined herein, the single majority shareholder exemption and exemptions for nonvoting stock, preferred stock, corporate debt and other corporate liabilities will continue to apply as they do now. Moreover, the EDP rule will not apply to a program supplier's investment in a licensee or station unless the program supplier provides over 15 percent of that station's total weekly broadcast

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98 *Attribution Notice*, 10 FCC Rcd at 3649-52.

99 While TCI argued that debt should not be encompassed under the EDP rule, NASA and others agreed with the Commission that its inclusion is proper. Given the fine line between debt and nonvoting equity in some situations, we believe that an exemption for debt might significantly undermine the rule.

100 Reply Comments in response to Attribution Further Notice of Fox at 2.

101 Reply Comments in response to Attribution Further Notice of Fox at 2.

hours. Thus, a program supplier may invest without limit in the nonvoting stock, preferred stock or debt of a licensee to which it does not provide the requisite level of programming without having its interest attributed.

42. Furthermore, same-market or other relationships not within the defined EDP triggering relationships described herein will continue to be non-attributable. For example, an investor that is not a major program supplier and that is not a same-market media entity (i.e., it does not have an attributable interest in a station, newspaper, or cable system in a given market) can continue to hold more than 33 percent of the total nonvoting assets of two stations or more in that same market without either interest being attributable.

43. The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. In this regard, some commenters have urged us to retain our current approach or implement a new case-by-case approach, considering the combined impact of multiple business and financial relationships in a particular transaction. Viacom, for example, argued for attribution criteria that would require the Commission to examine, on a case-by-case basis, whether an interest holder is contractually precluded from participation in programming, personnel, or budget decisions.

44. However, we believe that the bright-line EDP test is superior to a case-by-case approach. The EDP rule will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs. While an *ad hoc* approach might be more tailored than the EDP rule, it also might lead to complicated interpretation and processing difficulties and would likely add uncertainty to resolution of attribution cases. Of course, we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review.[102] Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the EDP rule. We do not intend by this reservation of discretion to resurrect the cross-interest policy, elsewhere eliminated in this *Report and Order*. Rather, we merely emphasize our obligation under the Communications Act to apply the public interest standard and, as necessary, to scrutinize extraordinary or unanticipated circumstances that may arise.

45. In the *Attribution Further Notice*, we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities.[103] While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and might curb investment in smaller, minority, or UHF

[102] For example, we note that we have applied a control premium, which we defined as "that percentage of increase over the book value of a block of stock which carries control of the corporation," in analyzing certain cases. *See Roy M. Speer*, 11 FCC Rcd 18393, ¶¶ 139-42 (1996), *on recon.*, 13 FCC Rcd 19911 (1998).

[103] *See Attribution Further Notice*, 11 FCC Rcd at 19906.

stations, in particular, or in digital television, others have argued strongly that this is not the case.[104] We have no reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it limits nonattributable investment levels for entities that have the potential to influence licensees. Moreover, the limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. Additionally, to help assure that our actions today do not unduly impede capital flow to broadcasting, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules. In addition, we will consider individual rule waivers in particular cases where substantial evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

46. While we have invited comment on those issues, it is nonetheless our view that promoting our goal of ensuring adequate funding for the transition to digital television is better accomplished through our ownership rather than our attribution rules. The attribution rules are designed to attribute entities that wield significant influence on core operations of the licensee. It is the ownership rules that limit investment based on our core policies of diversity and competition. Arguments with respect to whether additional investment should be permitted have been made in the context of our companion multiple ownership proceedings. We believe that the attribution rules should function as precisely as possible to identify influential interests and that relaxation of ownership limits, if warranted, should be accomplished directly through revision of the multiple ownership rules, not indirectly through manipulation of what is considered "ownership."

47. Triggering Relationships. As we proposed in the *Attribution Further Notice*, the EDP approach will focus directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee. The approach of focusing on specified triggering relationships would extend the Commission's current recognition that the category or nature of the interest holder is important to whether an interest should be attributed. For example, under the current broadcast attribution rules, passive investors are subject to a higher voting stock attribution benchmark,[105] since these parties are subject to fiduciary and other restraints on their exercise of influence over licensees and are, by their nature, principally concerned with investment returns rather than direct influence over the licensee. The two relationships that will trigger the rule, major program supplier and same-market media entity, are relationships that afford the interest holder the incentive and means to exert influence over the licensee.

48. In adopting the EDP rule, we affirm our tentative conclusion in the *Attribution Further Notice* that there is the potential for certain substantial investors or creditors to exert significant influence over key licensee decisions, even though they do not hold a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to

[104] For example, Viacom commented that an equity/debt plus standard would not jeopardize availability of capital to broadcasters, noting that the proposal does not preclude additional investment but merely caps it, and that any potential impact could be offset by raising the passive-investor benchmark. Comments in response to Attribution Further Notice of Viacom at 15.

[105] 47 C.F.R. § 73.3555 Note 2(c).